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SUMMARY OF ARGUMENT

The Appellant asserts that his arguments in his original brief to this court are correct and true.

I. The Appellant asserts that the jury that convicted him was not a fair cross section of the community because the jury venire was all white.

II. In Argument II, Appellant McDonald asserts that his conviction was not supported by substantial, competent evidence to show he was involved in a murder (as opposed to merely planning a burglary or robbery).

III. Appellant McDonald asserts that he should be given a new penalty phase hearing because the Appellant was denied a separate penalty phase jury and a jury separate from the Co-Defendant. Additionally, the Appellant was not informed of the trial jury's basis for conviction for first degree murder (premeditated murder or felony murder during the course of a robbery or burglary).

IV. Appellant McDonald asserts the trial court erred in sentencing him to death based on the doctrine of proportionality when the Appellant's penalty phase jury was not aware of Co-Defendant Denise Davidson's conviction of first degree murder and subsequent life sentence.

V. The trial court erred by finding that the Appellant acted in "a cold, calculated, and premeditated manner", because the evidence does not support a heightened degree of premeditation or a calculated plan to kill.

VI. The trial court erred by finding that the Appellant acted in "a heinous, atrocious, and cruel manner" because the State did not prove that the victim was conscious during the attack.

VII. The trial court erred by allowing DNA test results to be entered into evidence without following the two step process required to determine the accuracy of the test results. This error was not harmless and a new trial is required.

ARGUMENT

I. APPELLANT McDONALD ASSERTS THAT HE SHOULD BE GIVEN A NEW TRIAL BECAUSE HE WAS CONVICTED BY A JURY SELECTED FROM AN ALL WHITE JURY VENIRE.

The Appellant relies and stands on his initial brief for argument. (p. 8-9 of Appellant's initial brief).

II. APPELLANT ARGUES THAT THE EVIDENCE IS NOT SUFFICIENT TO SUPPORT A CONVICTION OF MURDER IN THE FIRST DEGREE AND THAT THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE EVIDENCE.

The Appellant stands on his initial brief and wishes to emphasize the following points:

1. The Appellant's conviction rested on circumstantial evidence - no witness placed him in the victim's residence at any time, the Appellant's blood, hair, and fingerprints were not found at the crime scene, the Appellant was not linked to any instrument which may have been used to commit the murder - i.e., electric cord, rope, club, bat or bludgeon.

2. The States witness, Susan Shore did not place the Appellant inside or even in the proximity of the victim's apartment. Instead, she stated that the Appellant went for a jog and did not return until after Co-Defendant Gordon whom she did place in the vicinity of the crime scene.

3. The murder scene indicated that the victim struggled fiercely before being killed. A broken toilet flooded the floor with water, and blood was splattered on the walls and ceiling.

4. Shore testified that the Appellant did not show any signs of having been in a struggle, his cloths were not ripped, torn, or bloody, and he did not have any lacerations.

This appeal involves a death sentence. Death is different from all other forms of punishment. It is unique in its total irrevocability. Furman v. Georgia, 408 U.S. 238 (1972). It is well established that in a death penalty case there is a heightened degree of Due Process as well as different evidentiary standards. This Court has stated where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. Barwick v State, 660 So.2d 685 (Fla. 1995); McArthur v. State, 351 So.2d 972 (Fla.1977).

In the instant case, the State mistakenly asserts that Appellant McDonald was placed inside of the victim's apartment by virtue of Susan Shore's testimony. (States answer brief, p. 21). He was only placed at the apartment building parking lot after which Shore testified that he left her sight to go for a morning jog. (T: 1644, 1653).

The State also claims a sweatshirt that had a small amount of the victim's blood on it, and fibers from the crime scene proves that the Appellant was inside the victim's apartment. (States answer brief p.21). However, the only evidence linking the Appellant to the sweatshirt is a single facial hair the State claims belongs to the Appellant.(T: 1229, 1231, 1256, 1276, 1283). Setting aside the Appellant's arguments about the validity of the DNA tests done on the sweatshirt which are outlined infra, the fact remains that Susan Shore could not identify the sweatshirt as belonging to the Appellant, or say that he was wearing the article the day of the murder. (T: 1640). Additionally, witness Claire Dodd indicated that the Appellant may have been wearing black clothes (the sweatshirt is gray).(T: 1081). Furthermore, the sweatshirt was found nearly a month after the murder in an unsecured hotel lost-and-found box mixed in with numerous other

articles of clothing.(T1060). For all practical purposes, the sweatshirt may have belonged to Co-Defendant Gordon and may have picked up the Appellant's single facial hair (if it really is his hair) by association.

Finally, it is implausible that the Appellant could have participated in a murder where the victim violently fought back, and not have suffered any noticeable cuts, bruises, or tears, water or blood on his clothing.

Considering the severity of the Appellant's death sentence, and the heightened Due Process and evidentiary standards that must be applied, it is clear that there is insufficient circumstantial evidence to support the first degree murder conviction in this case.

III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR A SEPERATE PENALTY PHASE JURY.

Again the Appellant reminds the Court of the severity of his punishment and the heightened Due Process standard which is accorded to death penalty cases. The idea of separate penalty phase juries was critical to the Appellant's Due Process.

The Appellant was never informed of the basis for the jury's guilty verdict (felony murder vs. pre-meditated murder). This placed the Appellant in an disadvantaged position during the penalty phase because he was being tried along with his Co-Defendant and the respective parties could not present evidence which would support a lessened degree of individual culpability without damaging the other parties position. (Commonly called a cut-throat defense).

This offends the very notion of Due Process and necessitates a new penalty phase hearing for the Appellant.

IV. THE APPELLANT SHOULD BE GIVEN A NEW PENALTY PHASE HEARING BECAUSE THE ORIGINAL PENALTY PHASE JURY WAS NOT AWARE OF CO-DEFENDANT DENISE DAVIDSON'S CONVICTION OF FIRST DEGREE MURDER AND SUBSEQUENT LIFE SENTENCE.

Co-Defendant Denise Davidson was convicted of first degree murder. The State provided evidence that she spent months directing the initiative to have her husband murdered. According to the state she oversaw every painstaking detail of the murder, from providing the killers with her husband's work schedule, place of employment, location of residence, mobile communication capability - to ultimately paying the killer's for their services. Davidson was not just a planner or organizer of her husband's murder, instead, she was the ultimate director of the murder which was staged in order to resolve a nasty child custody battle that she was embroiled in with the victim. Yet, even with overwhelming evidence that she directed her husband's murder she was sentenced to life in prison instead of death.

In the instant case, the Appellant's penalty phase jury was not able to weigh this important mitigating factor because Davidson's sentencing took place after the Appellant's. The State argues that because the trial judge was able to weigh Davidson's life sentence the Appellant's constitutional rights were adequately safeguarded during the penalty phase of his trial. The State's theory is incorrect because the Eighth and Fourteenth Amendments to the Constitution require the sentencer in a capital case not be precluded from considering, as a mitigating factor any aspect of a defendant's character, record, or any circumstances of the offense that the defendant proffers as a basis for a sentence less than death Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982), and since Florida is a dual sentencing state both the jury and the

penalty phase judge play important roles. Espinosa v. Florida, 505 U.S. 1079 (1992); Sochor v. Florida, 504 U.S. 527 (1992).

In Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), this Court stated that the sentence of an equally culpable Co-Defendant to life or a lesser term is of such importance as a mitigating circumstance that it constitutes newly discovered evidence if the Co-Defendant's sentencing takes place after the defendant's. The judge in her sentencing order gave little weight to the Co-Defendant's life sentence because the judge believed that the Appellant was more culpable than the Co-Defendant. However, the jury may have disagreed on the degree of culpability, and by Florida law the jury's opinion must be given great weight. Tedder v. State, 322 So. 2d 908 (Fla. 1975); Smith v. State, 515 So.2d 182 (Fla. 1987). Therefore, the Appellant should be given a new penalty phase hearing, one in which the jury can decide the degree of culpability and weigh the Co-Defendant's life sentence.

V. THE TRIAL COURT ERRED BY FINDING THAT THE APPELLANT ACTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

The State contends that it was the intention of the Appellant to enter the victim's apartment and kill him, however, the Appellant points to ample evidence that supports his theory that at most he was involved in a plan to rob the victim.

The State points out that in confronting the victim, the Appellant, incurred the risk that the victim may have been armed with a gun, or could have called 911.(p.41 of States answer brief). If the Appellant went to such great lengths as to plan the victim's murder as the State contends, why wasn't a weapon used or at least brought along? Furthermore, why was the victim blindfolded if he was going to be killed in short order? The act of

blindfolding the victim suggests that he was going to be left alive and that the robbers did not want the victim to be able to identify those present.

Since the evidence reasonably supports the Appellant's argument that he in no way planned on murdering the victim the C.C.P. aggravating factor should not apply. Geralds v State, 601 So.2d 1157 (Fla. 1992).

VI. THE TRIAL COURT ERRED BY FINDING THAT THE APPELLANT ACTED IN A MANNER THAT WAS HEINOUS, ATROCIOUS AND CRUEL.

The Appellant relies and stands on his initial brief for this argument with special emphasis on section B. (p.27 - 28 of Appellant's initial brief).

VII. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW PENALTY PHASE BASED ON CERTAIN INAPPROPRIATE STATEMENTS MADE BY THE PROSECUTION DURING THE CLOSING ARGUMENTS OF THE PENALTY PHASE.

The Appellant relies and stands on his initial brief for this argument. (p.28 - 30 of Appellants initial brief).

VIII. THE TRIAL COURT'S FAILURE TO CONDUCT THE REQUIRED STEP - BY - STEP INQUIRY TO DETERMINE WHETHER DNA TEST RESULTS AND STATISTICAL CONCLUSIONS WERE ADMISSIBLE IS NOT HARMLESS ERROR AND A NEW TRIAL IS REQUIRED.

The Appellant relies and stands on his initial brief for this argument (p. 31 - 32 of Appellant's initial brief), and wishes to emphasis the following.

1. Results from DNA tests conducted on the gray sweatshirt discussed supra were critical to the State's argument that the Appellant was present during the murder.

2. The process of obtaining accurate DNA test data is subject to relatively new and complex scientific methods which may be inaccurate

due to a two pronged error risk, a) errors may occur due to improper collection, handling, and actual testing methods, b) errors may manifest because of improper interpretation and application of the test data resulting in faulty conclusions.

3. The trial court failed to insure that the two distinct elements of DNA testing (scientific, and interpretation of statistical population genetics) satisfied the requirements of Frye and Brim. Brim v. State, 22 Fla. L. Weekly S45 (Jan 16 1997); Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923).

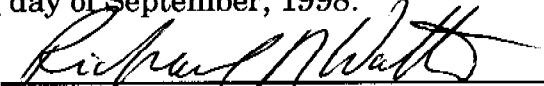
4. The trial court's failure to determine whether the DNA test results satisfied Frye is not harmless error and the Appellant is entitled to a new trial. Murry v. State, 22 Fla. L. Weekly S203 (Apr. 17 1997).

CONCLUSION

For the reasons outlined above, Appellant McDonald states that this court should reverse the trial court's decision and either; a) enter an Order of Acquittal; b) grant a new trial; c) vacate the death sentence and remand with instructions to impose a life sentence, or d) grant a new penalty phase hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent by U.S. Mail to the Office of the Attorney General, 2002 North Los Avenue, Suite 700, Tampa, Florida 33607 this 25th day of September, 1998.


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